UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

ORCHIDS PAPER PRODUCTS CO., and UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO,	Cases 14-CA-184805 14-CA-184807 14-CA-188413 14-CA-189031 14-CA-190022 14-CA-192908 14-CA-199035

RESPONDENT ORCHIDS PAPER PRODUCTS CO.'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Steven A. Broussard
Molly Aspan
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, Oklahoma 74103-3706
Telephone: (918) 594-0595
Facsimile: (918) 594-0505
maspan@hallestill.com

ATTORNEYS FOR RESPONDENT ORCHIDS PAPER PRODUCTS CO.

Respondent Orchids Paper Products Co. ("Orchids" or "Respondent"), by and through its attorneys and pursuant to Section 102.46(a) of the Rules and Regulations of the National Labor Relations Board ("Board"), takes exception to Administrative Law Judge Andrew S. Gollin's ("ALJ") September 15, 2017 Decision from the June 20-22, 2017 hearing as follows:[1]

1. The ALJ's factual findings in the Decision do not quote or consider the entire Management Rights provision contained in the Collective Bargaining Agreement ("CBA") between Orchids and the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the "Union") for Orchids' Converting facility. ALJD at 3:24-37. Specifically, the ALJD does not quote the end of the Management Rights clause, which states that "[i]t is expressly understood and agreed that all rights heretofore exercised by the Company are inherent in the Company as owner of the business or is incident to the management, and those rights not expressly contracted away by specific provisions of this Agreement are retained solely by the Company." *See* GC Ex. 2 at 2-3.

2. The ALJ erroneously applied the Board's recent decision, *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), currently under appeal with the United States District Court for the District of Columbia ("*BFI*"). Based on this erroneous application, the ALJ erroneously concluded that Orchids was a joint employer with its temporary staffing agency and previous co-Respondent People Source Staffing Professionals, LLC ("People Source"). ALJD at 20:40-21:16. The ALJ presumed a joint employer relationship and failed to consider the context and circumstances of this case.

---

[1] References to the page(s) and line number(s) of the ALJ's Decision dated September 15, 2017, are designed "ALJD," references to the hearing transcript are designed "Tr.," references to the General Counsel's Exhibits are designated "GC Ex.," references to the Joint Exhibits are designated "Jt Ex.," and references to Respondent Orchids' Exhibits are designated "R Ex."

3. The ALJ's finding that Orchids and People Source were joint employers blatantly ignores the distinctions between the hiring and onboarding process used by People Source and the hiring and onboarding process in *BFI*.

4. The ALJ's factual finding in the Decision that "Respondent also uses some of the temporary employees to work on production lines or in other areas of the facility, performing the same or similar tasks as the unit employees" does not consider the full testimony. ALJD at 5:38-39. *See also* ALJD at 22:n17. Specifically, it disregards testimony pertaining to the fact that the temporary workers did not have full access to the plant, but were restricted to the periphery. Tr. at 159, 169, 806, 809.

5. The ALJ's factual finding in the Decision pertaining to who supervises the temporary workers and the level of supervision involved disregards any testimony from anyone other than his characterization of general statements made by the only two (2) temporary workers who testified at the hearing. ALJD at 6:8-16, 21:35-43.

6. The ALJ's factual finding in the Decision pertaining to Orchids requests for replacement temporary workers from People Source mischaracterizes the exhibits. ALJD at 6:18-21, 21:25-29. *See also* GC Exs. 28-33.

7. The ALJ's factual finding in the Decision pertaining to the pay of the temporary workers mischaracterizes the testimony of the People Source representative who testified at the hearing, Melanie McMains, and erroneously concludes that "Respondent is involved in the temporary employees being paid." ALJD at 6:23-27, 21:45-50.

8. The ALJ's factual finding in the Decision erroneously states that "People Source calculates the hours worked and then sends the totals back to Respondent to verify that the employees worked the hours listed." ALJD at 6:24-25, 21:48-49.

9. The ALJ erroneously concluded that "Respondent and People Source are joint employers because they *directly* codetermine the essential terms and conditions of employment for these temporary employees." ALJD at 22:1-3.

10. The ALJ erroneously stated that "Respondent has presented no contract provisions, other than the provisions in Article 16 and Article 6 giving it the right to decide whom to hire, to support its claim that it had no obligation to apply the terms of the contract to those temporary employees once they completed the 60-day probationary period." ALJD at 22:21-23:2.

11. The ALJ erroneously concluded that "Respondent failed to abide by the terms of the agreement by not providing the contractual pay or benefits to those temporary employees who completed their 60 days of employment, without the Union's consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act." ALJD at 23:2-5.

12. The ALJ mischaracterizes the August 4, 2016 meeting with Site Manager Court Dooley ("Dooley") and Operations Manager Brian Merryman ("Merryman") for Orchids and Union Staff Representative Chad Vincent ("Vincent"), Local Union Vice-President Jason Gann ("Gann"), and Local Union President Michael Besley ("Besley") for the Union. ALJD at 7:4-20. The record evidence that was disregarded pertains to the circumstances of the meeting and Vincent implying that he was going to impose consequences for Orchids' decision to terminate its previous Human Resources Manager. Tr. at 812-15.

13. The ALJ erroneously concluded that, contrary to Dooley's testimony, "I find that confusion [about the People Source employees] was resolved by Vincent's August 12 email to Dooley explaining exactly what should happen per the terms of the agreement." ALJD at 23:16-17, 29:39-41.

14. The ALJ erroneously found that "Respondent, therefore, failed to abide by Article 6 of the parties' agreement, without the Union's consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act." ALJD at 23:19-21.

14. The ALJ's factual findings in the Decision downplay and only briefly address that Orchids, through Vice President of Operations Eric Diring ("Diring"), bargained in good faith by offering to bring the work performed by the People Source temporary employees into the bargaining unit. ALJD at 10:1-5.

15. The ALJ erroneously found that "because Dooley acknowledged Respondent terminated the assignments of these five named employees in response to the Union asserting that such employees were covered by the parties' agreement and entitled to receive contractual pay and benefits, I find that those terminations were because of protected concerted and union activities, in violation of Section 8(a)(3) and (1) of the Act." ALJD at 23:23-27.

16. The ALJ's legal analysis pertaining to Article 37 of the CBA and the conversion of lines 6 and 7 to a High Performance System, or "Op-Tech" line, erroneously concludes that Article 37 of the CBA was unambiguous. ALJD at 24:24-25.

17. The ALJ's statement that "Article 37 of the parties' agreement explicitly addresses the conversion of lines 6 or 7 to Op-Tech lines and requires that 'both parties will discuss and must agree' before conversion of one or both of those lines could occur" fails to quote the entirety of Article 37 and only provides the ALJ's summary interpretation of the provision. ALJD at 24:15-17.

18. The ALJ inexplicably fails to credit the testimony offered by Dooley regarding conversations he had with Union representatives who were part of the negotiation of the previous CBA (Willa Wright, former Union local president, and Chris Montoya, former Union committee member) – simply because Orchids did not call Ms. Wright or Mr. Montoya to testify at trial. ALJD at 24:29-

32. The ALJ erroneously reached this conclusion even though Dooley immediately documented these conversations with Ms. Wright and Mr. Montoya in writing to the Union and even though the Union failed to offer **any** evidence to the contrary. *See* Tr. at 828-30; GC Exs. 16, 18.

19. The ALJ's factual finding in the Decision that "[a]t the August 4 labor-management meeting, Brian Merryman raised that the company wanted to convert lines 6 and 7 to Op-Tech lines" is misleading, as the conversion had been raised earlier, but this was a discussion about the process for the conversion. ALJD at 10:34-35.

20. The ALJ erroneously found that "by failing to get the Union's consent before moving forward with the conversions of lines 6 and 7 to Op-Tech lines, Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act." ALJD at 24:36-38.

21. The ALJ misapplied Board precedent in concluding that "the identity of the employees' health insurance carrier is as much a mandatory subject of bargaining as is the level of benefits the employees employ" and disregarding whether it was a "material, substantial, and significant" change. ALJD at 25:16-18.

22. The ALJ erroneously found that "Respondent had an obligation to bargain over the change in carriers and the effects of that change, and that its failure or refusal to do so violations Section 8(a)(5) and (1) of the Act." ALJD at 25:20-22.

23. The ALJ's factual finding in the Decision that "[t]he Union asked Court Dooley whether the maintenance employees would need to wear their FR clothing all the time, and Dooley responded that he did not see why they would need to wear it other than when they were working near the electrical cabinets" is erroneous and ignores the fact that Graham Darby, Orchids' Maintenance Engineering Manager, was clear with all the maintenance employees that the FR clothing should be

worn at all times and never made any exceptions. ALJD at 16:24-28, 26:30-32. *See also* Tr. at 420, 443, 616-21, 699, 705-06.

24. The ALJ's factual finding in the Decision that "Matt Rhodes gave Michael Besley a similar answer when the two spoke in early May 2017" is erroneous. ALJD at 16:36-39, 18:12-14, 26:33-34. Rather, Rhodes testified that he reminded Besley about a meeting a few days prior with Darby where Darby specifically said that the clothing was to be worn at all times. *See* Jt Ex. 30 at 8.

25. The ALJ erroneously found that "Respondent, through Darby, broadened the FRC policy in May 2017 when he announced that maintenance employees would be required to wear their FR clothing at all times while they were on duty, as opposed to when they would working within the arc flash boundaries." ALJD at 26:38-41.

26. The ALJ erroneously found that "Respondent announced and implemented this broader policy without providing the Union with notice or an opportunity to bargain over the decision or its effects, in violation of Section 8(a)(5) and (1) of the Act." ALJD at 26:41-43.

27. Based on the ALJ's erroneous conclusion over the FRC policy, the ALJ consequently erroneously held that Michael Besley's May 15, 2017 suspension and May 23, 2017 discipline for violating the FRC policy are a violation of Section 8(a)(5) and (1) of the Act. ALJD at 27:7-12.

28. The ALJ erroneously summarized conversations with Michael Besley, Matt Rhodes, and Richard Keith on May 6 and 7, 2017. ALJD at 18:12-35.

29. The ALJ erroneously found that the timing of Besley's warning and Orchids' "apparent tolerance of [Besley's] infractions" with regard to the CMMS system and the failure to escalate "support that the warning was motivated by animus." ALJD at 28:2-5.

30. The ALJ erroneously found that "Respondent failed to offer a credible explanation for why it waited to issue Besley the warning, and it failed to present comparable evidence that it would have issued the warning if he had not engaged in protected activities." ALJD at 28:5-7.

31. The ALJ erroneously found that "the issuance of the written warning for failing to properly use CMMS and comply with escalation requirements was discriminatorily motivated, in violation of Section 8(a)(3) and (1) of the Act." ALJD at 28:7-9.

32. The ALJ erroneously concluded that "Respondent discriminatorily promulgated rules prohibiting Union officers or agents from talking to employees in other areas, except during non-work time, while allowing employees to discuss other, non-union related matters during work time, in violation of Section 8(a)(1) of the Act." ALJD at 28:44-48.

33. The ALJ erroneously concluded that "Respondent unilaterally modified the terms of the parties' agreement (Article 8, section 5) without the Union's consent, by making these blanket statements to Union officers that they were prohibited from discussion Union business during work time or on the production floor, regardless of whether they obtained their supervisor's permission, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act." ALJD at 29:1-5.

34. The ALJ's factual finding in the Decision that at on August 24, 2016, Dooley understood what the Union was seeking and blamed the Union for the discharge of the five (5) named employees, knowing it "not to be true" is erroneous. ALJD at 29:39-41.

35. The ALJ erroneously concluded that "Dooley continuing to blame the Union for the discharge of these employees after he knew that not to be true, particularly in response to a Union official filing a grievance regarding those temporary employees, had a reasonable tendency to interfere, restrain or coerce employees in the exercise of their Section 7 rights" in violation of Section 8(a)(1) of the Act. ALJD at 29:41-45.

36. The ALJ's factual finding in the Decision that "Dooley told Reed and Besley that they could not talk Union business on the floor" and that it "had to be on their breaks" was erroneous. ALJD at 11:30-32, 30:8-9. The ALJ's factual finding in the Decision that "Dooley did not refute this testimony" is inaccurate, as Dooley testified that he did not ever tell any employee that they were prohibited from talking about the Union. ALJD at 11:32. *See also* Tr. at 833.

37. The ALJ erroneously concluded that "Dooley's broad statement prohibiting employees from discussing the Union while on work time or on the work floor, contrary to past practice, while allowing other non-work related discussions, violated Section 8(a)(1) of the Act." ALJD at 30:18-20.

38. With respect to the December 2016 conversation between Bradley Blower ("Blower"), Kelly Foss ("Foss") and Darla Reed ("Reed"), the ALJ erroneously concluded that "under these circumstances, the vague accusations of harassment and instructions to stop could reasonably be interpreted as reaching protected – but unwelcome – union solicitation or activity" in violation of Section 8(a)(1) of the Act. ALJD at 30:30-35.

39. The ALJ erroneously concluded that "Dooley's blanket statements [to Gann about how Gann spoke to and cussed at management employees] reasonably would have a tendency to interfere with, restrain, or coerce employees in the exercise of their protected concerted and union activities, in violation of Section 8(a)(1) of the Act." ALJD at 30:47-49.

40. The ALJ erroneously concluded that Dooley's statement that "I just want to let you know that people are reporting to me saying you are doing Union business on company time" is a violation of Section 8(a)(1) of the Act. ALJD at 31:1-20. The ALJ's reliance on *Stevens Creek Chrysler*, 353 NLRB 1294, 1296 (2009) and *Conley Trucking*, 349 NLRB 308, 315 (2007) is oversimplified, as they do not stand for a blanket proposition that any knowledge of Union activities constitutes surveillance.

41. The ALJ erroneously concluded that Dooley's statement to Gann asking him to let his lead know when he goes to deal with Union matters "reasonably create the impression that Gann's Union activities would be placed under greater scrutiny" and is a violation of Section 8(a)(1) of the Act. ALJD at 31:22-37.

42. With respect to the February 2017 conversation between Blower, Foss and Reed, the ALJ erroneously concluded that "under these circumstances, the vague accusations of harassment and instructions to stop could reasonably be interpreted as reaching protected – but unwelcome – union solicitation or activity" in violation of Section 8(a)(1) of the Act. ALJD at 31:47-50.

43. With respect to the February 8, 2017 conversation between Moss and Dooley and Reed and Montoya, the ALJ erroneously concluded that "Dooley's broad statement prohibiting employees from discussing the Union while on the work floor or on work time" was a violation of Section 8(a)(1) of the Act. ALJD at 32:37-39.

44. The ALJ's determination in the Decision that Moss's statement restricting what Reed and Russell can say in future employee meetings was overbroad, even if he was restricting them from using profanity, was a violation of Section 8(a)(1) of the Act is erroneous. ALJD at 33:1-17.

45. The ALJ's factual finding in the Decision that Reed and Russell's statements were not directed at Moss personally was erroneous. ALJD at 33:11-13.

46. The ALJ erroneously concluded that Jeff Cochrell's statement about "discussing Union business on the production floor on company time" was a violation of Section 8(a)(1) of the Act. ALJD at 33:35-36.

47. As the ALJ erroneously held that Respondent modified the FR policy in violation of the Act, the ALJ then also erroneously concluded that Matt Rhodes and Richard Keith violated Section

8(a)(1) of the Act when they threatened Besley with suspension if he failed to wear his FR clothing. ALJD at 34:14-22.

48. The ALJ erroneously concluded that Moss's question to Besley as to why he was beating the pants thing to death amounted to a threat of unspecified reprisals. ALJD at 35:18-21.

49. The ALJ erroneously concluded that Moss' statement to Besley about reporting safety issues to the company "unlawfully interfered with or restrained employees' right to engage in protected concerted activities of seeking outside assistance in matters relating to employees' terms and conditions of employment" and is a violation of Section 8(a)(1) of the Act. ALJD at 35:30-35.

50. The ALJ improperly expanded the claims alleged in the Amended Fifth Consolidated Complaint to include individuals other than the five (5) named individuals as temporary employees of Orchids. ALJD at 39:20-21, 42:41-42.

51. The ALJ erroneously concluded violations of the Act in its Conclusions of Law Nos. 4-26. ALJD at 36:6-38:6.

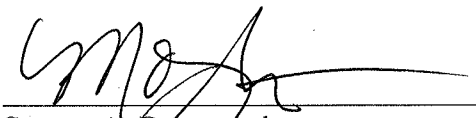
52. The ALJ erroneously issued a proposed remedy based on the errors excepted above. ALJD at 38:10-40:10.

53. The ALJ erroneously issued a proposed Order based on the errors excepted above. ALJD at 40:12-43:32.

WHEREFORE, Respondent Orchids Paper Products Co. respectfully requests that the Board refuse to adopt the Decision and recommendations of the ALJ, but rather dismiss the Amended Fifth Consolidated Complaint in its entirety. Orchids relies on the exceptions set forth above and its Brief in Support of Exceptions to Administrative Law Judge's Decision filed herewith.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.



Steven A. Broussard
Molly A. Aspan
320 South Boston Avenue, Suite 200
Tulsa, OK 74103-3706
Telephone: (918) 594-0595
Facsimile: (918) 594-0505
Email: maspan@hallestill.com

ATTORNEYS FOR RESPONDENT,
ORCHIDS PAPER PRODUCTS CO.

CERTIFICATE OF SERVICE

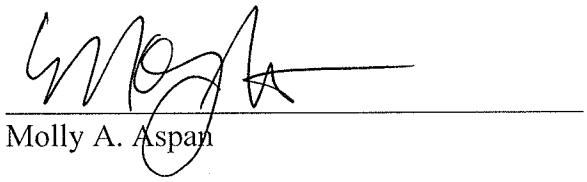
I, the undersigned, do hereby certify that on this 13th day of October, 2017, a true and correct copy of the above and foregoing document was filed electronically and sent by email to:

William F. LeMaster, Field Attorney
Julie M. Covel, Field Attorney
Subregion 17
8600 Farley Street, Suite 100
Overland Park, KS 66212
William.lemaster@nlrb.gov
Julie.covel@nlrb.gov

Chad Vincent, International Representative
United Steelworkers of America
P.O. Box 1410
Benton, AR 72018-1410
cvincent@usw.org

Bruce Fickman, Associate General Counsel
United Steelworkers Legal Department
Five Gateway Center, Room 807
60 Boulevard of the Allies
Pittsburg, PA 15222
bfickman@usw.org

Steven R. Hickman, Attorney
Frasier Frasier & Hickman
1700 Southwest Blvd., Ste. 100
Tulsa, OK 74107-1730
frasier@tulsa.com



Molly A. Aspan

3267308.1:630825:00700